

Lower Willamette Group
Co-Chairperson: Bob Wyatt, NW Natural
Treasurer: Larry Patterson, ATOFINA

March 4, 2003

Mr. Dan Opalski
Director of Oregon Operations
U.S. Environmental Protection Agency
811 SW Sixth Avenue
Portland, OR 97204

Mr. Neil Mullane
Oregon Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204



Re: Portland Harbor Superfund Site

Dear Dan and Neil:

We are writing with respect to our mutual interest in the Portland Harbor. As you know, the purpose of the Lower Willamette Group is to provide the technical work necessary to investigate the Portland Harbor and to recommend remedial action alternatives that will lead to its restoration, under EPA and DEQ oversight and with the participation of your tribal and trustee partners. Not only do we want to fulfill this task, but, in accordance with direction from both agencies, we want to do it as quickly as possible consistent with applying sound science to the complex issues that the Harbor raises.

As we have previously discussed, we believe that meeting the goal of achieving a timely yet scientifically sound cleanup requires all of us constantly to "think outside the box." We believe that we need to proceed consistent with the National Contingency Plan, EPA guidance and Oregon law, but we are committed with you to looking for and using processes that will get us to a Record of Decision faster than the norm.

The process we have undertaken to identify and resolve technical issues through issue-specific work groups is an example of such an innovative, and potentially very powerful, collaborative process. As you know, this process started with a mutual effort to identify all issues that any participant identified as being potential "road blocks" to decision. The identified issues were then assigned to technical sub-groups that included participation of EPA, DEQ, LWG and trustee partners for further discussion and recommended technical resolution.

The majority of the issues identified in this process have been technical, and they have been referred to the appropriate technical sub-group. As part of that process of issue identification, however, we have identified other potential "road block" issues that are procedural and not technical. Several of these issues relate to the overlapping authorities of EPA and DEQ in this cleanup.

We understand that EPA and DEQ will be meeting in early March to discuss issues of Portland Harbor coordination. We wanted to take this opportunity to bring to your attention several issues that we see as very significant and, unfortunately, very likely to become administrative roadblocks to achieving our goal of a speedy and scientifically sound cleanup of Portland Harbor. We would like to have a dialogue with EPA and DEQ on these issues, and we thought a good starting point would be for us to identify these issues to you and encourage you to discuss them when you meet. We are certain that there are creative ways to resolve each of these potential problems, and we look forward to working with you to find them.

Enclosed is a list of the potential administrative road blocks that we believe we need to work through in order to meet our mutual goals for Portland Harbor. We suggest scheduling a meeting to discuss these after you have had the opportunity to discuss them yourselves.

Very truly yours,



Mark Lewis
MFG
Interim Project Manager for the
Port of Portland



Sandra Hart
Manager, Risk, Environment, Land
Northwest Natural Gas



David B. Schwartzberg
Vice President, Health Environment & Safety
Atofina Chemicals, Inc.

Enclosure

c: Dean Marriott
Michael Gearheard
Tara Martich
Chip Humphrey
Dick Pedersen
Mike Rosen
Jim Anderson
LWG Executive Committee
LWG Legal Conunittee

March 4, 2003

Procedural/Administrative Issues in Portland Harbor Superfund Process

1. Agreement on How and When Early Cleanup Actions Will Proceed

Issue: DEQ and EPA project managers both assert a desire to have early actions performed in the harbor. LWG members are also interested in performing early actions. Under EPA rules and guidance, an "early action" is generally a non-time-critical removal action, a regulatory vehicle requiring preparation of an Engineering Evaluation/Cost Analysis (EE/CA). The LWG understands that DEQ may prefer a more truncated early action process.

Impact: Certain members of the LWG are interested in performing voluntary early CERCLA actions in the river. However, there is serious concern about performing them without receiving assurances that such actions will achieve some level of finality. LWG members do not want to spend the money on early actions unless they have appropriate assurances that they will not have to take additional remedial actions in the same area such that the early action ends up being cost-ineffective, for example, because of recontamination by other sources.

Possible Solutions: The LWG sees at least a couple of possible solutions to this problem, once EPA and DEQ reach a common understanding of the process for early actions. EPA and DEQ could enter into joint, or parallel, agreements with parties performing early actions. Or, EPA, DEQ and parties performing early actions could reach an understanding that, although early actions would be performed under agreements between EPA and the performing party, early actions would ultimately be incorporated into the Record of Decision and accepted by DEQ. In either case, the performing parties will need some level of assurance of finality.

*right
to be put into
upland source
control
+
characterizing
the river
under
ASC*

2. Overlapping Authorities and Differing Views Regarding the Groundwater Pathway to the River

Issue: Our perception is that DEQ and EPA are working independently in evaluating the groundwater pathway to the river.

Impact: It is difficult for the LWG, or for members who are also investigating groundwater under Voluntary Cleanup Agreements with DEQ, to get a clear understanding of what is expected of them in terms of groundwater investigation and groundwater path-related risk-assessment. Additionally, there is a concern that efforts undertaken separately for EPA and for DEQ will be duplicative and will therefore unnecessarily drive up costs.

Possible Solutions: The LWG would appreciate it if DEQ and EPA could clarify their roles with respect to investigation of and lead decision-making authority regarding

groundwater. Specifically, because EPA is charged with investigating the sediments generally, we believe it should be EPA's responsibility to investigate the effect of any groundwater reaching the biologically active zone of the sediment/water interface and to make decisions with respect to the risk created thereby. It should be DEQ's responsibility to determine what groundwater contaminants are making it to ~~that~~ ^{the RIVER} biologically active zone and, if, based on EPA's risk assessment, source control measures are required for that contaminant pathway, to impose those source controls. Both agencies will need to coordinate efforts so that there can be agreement on appropriate source control remedies, where needed.

Leadership Structure in EPA and DEQ

Issue: All parties have previously agreed to the process of resolving "road block" technical issues prior to the LWG's submission of the draft revised Work Plan. In order for that process to achieve its goal, it is critical that EPA and DEQ management be available in early March to make the necessary management decisions on all issues that are work plan-critical.

Impact: If these decisions are not be made on the agreed-upon schedule, that will affect either the LWG's ability to get a workplan to EPA that satisfactorily addresses these issues or (if that is not done in advance of workplan submittal as planned) EPA's ability to speedily approve the workplan. Either scenario could lead to delay in 2003 sampling and, potentially, inability to complete the RI/FS in the time frame we have agreed is appropriate for this site.

Possible Solutions: EPA, DEQ and the LWG had previously designated late March, 2003 as the date by which technical issues would either be resolved by the technical subgroups or by decisions made by the EPA/DEQ/LWG management group. The LWG remains committed to that process and that timeline and hopes that despite recent project personnel changes EPA and DEQ remain so committed. The LWG suggests that EPA, DEQ and LWG management agree to specific meeting times in both the second and third week of March to make the necessary management decisions on these issues so that they can be incorporated into the work plan.

4. Permit Exemption Authority for Removal, Source Control or Remediation Projects Under DEQ Oversight

Issue: When EPA finally selects one or more remedial actions in the Record of Decision (or if it enters into agreements with individual parties for early actions), it will include all necessary conditions and the on-site cleanups will be exempted by virtue of CERCLA section 121(e)(1) from the need to obtain federal, state and local permits. However, when a party agrees with DEQ to perform an upland remedial action that requires any in-water or bank work, DEQ currently does not have the ability to assure the applicability of section 121(e)(1)'s permitting exemption regarding such federal permits as those required by Clean Water Act section 404 and Rivers and Harbors Act section 10. EPA has indicated that it lacks sufficient resources to use its authority to achieve this end.

↑ need to be
State using State law - 2 -

yes
State determines
gw is
discharging
to RIVER
& contamination
ACAR → restore
gw!

Not exactly
They should
be addressing
any gw
problem,
but taking
action
to stop
it
from
reaching
the
river
if it is

How much of 2
written record
do we have
white papers ...
3 - where we agree
or not
GW - none
Eco/ECL writing
a white paper

1. Eco risks
white paper
our response
2. Human Health
3. Nature & Extent
4. GW

Tara +
Chip
3/6 + 7
meeting
Said
work plan
required
to matter
what

Impact: Given the very limited work windows for in-water work and the inevitable delays associated with the permitting processes of multiple agencies, an inability to take advantage of the CERCLA section 121(e)(1) exemption at this Superfund Site is likely to result in at least a year delay to any in-water work or bank work. Consequently, human and ecological health impacts would result. Also, dependent or downstream cleanups will themselves be delayed.

Possible Solutions: The LWG believes that this problem could be solved at least two ways: (1) EPA could use its authorities by entering a joint agreement, or parallel agreement, with DEQ, directing the work and activating the permit exemption; or (2) EPA could enter into a cooperative agreement with DEQ pursuant to CERCLA section 104 authorizing DEQ to exercise CERCLA authority (in addition to its existing state law authorities) with respect to designated types of remedial actions, which agreement would give DEQ the power to select a remedy without the separate processes contemplated in (1), above.

Is this true?

5. **Need for EPA to Provide Approval of DEQ Source Control and Remedial Action Decisions**

Issue: The agencies' MOU gives DEQ lead authority with respect to upland investigation and remediation issues and gives it the obligation to institute upland source control. Under the AOC, EPA and DEQ have specifically agreed to share responsibility for the investigation and cleanup of the Site. In both the MOU and the AOC, EPA commits to review DEQ's decisions in its support agency role for this work. While EPA has apparently provided some comment on certain PRP deliverables to DEQ, it has not given any formal blessing of DEQ decisions equivalent to an approval.

Impact: Certain upland property owners who are performing work under DEQ Voluntary Cleanup Agreements are getting to the point where they are ready to, or soon will be ready to, undertake major upland remedial actions or source control actions that they expect to be final. Some property owners may be reluctant to proceed far down this path if they are not comfortable that both DEQ and EPA will treat their source control actions or remedial actions as final.

Possible Solution: It would be extremely helpful if EPA could devote resources to this important function under the MOU.